STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KENNETH JOE FELIX, Deceased.

WILLIAM J. WADDELL,

Petitioner-Appellee,

v

ESTATE OF KENNETH JOE FELIX,

Respondent-Appellant.

UNPUBLISHED
July 14, 2005

No. 254751
Kent Probate Court
LC No. 03-176243-DE

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Respondent, Estate of Kenneth Joe Felix, appeals as of right from the trial court's order granting petitioner, William Waddell's, motion for attorney fees and costs stemming from Waddell's representation of the estate. Because the trial court did not err when it found that a contract existed between the parties, that Waddell was authorized to settle the estate's claim with State Farm and conducted his investigation appropriately, when it approved Waddell's request for his attorney fee and costs, and when it ordered settlement, we affirm.

On September 3, 2003, decedent was killed when a car driven by Bartholomew Fongers struck his car. Fongers was charged and convicted of one count of negligent homicide. Decedent was survived by his wife, Mary Margaret Felix, his daughter Regina VanderKlok, and his sons Kenneth and Greg Felix. VanderKlok retained Waddell's services on September 5, 2003, to explore a potential a wrongful death claim. VanderKlok was named personal representative of decedent's estate on September 9, 2003. The Felix family instructed Waddell to investigate and research all potential claims against all potential parties. Although the Felix family became dissatisfied with Waddell's services and consulted another attorney, VanderKlok and Greg reiterated their instructions to Waddell at a subsequent meeting. VanderKlok later discharged Waddell, but only after he had negotiated settlements on behalf of the estate. Waddell filed a motion to withdraw as counsel and for his attorney fee, which was a one-third contingent fee, and costs incurred. The trial court allowed for substitution of counsel, and the parties submitted additional briefs on the fees issue. The trial court then issued an opinion and order awarding Waddell the entire one-third contingency fee and costs. The trial court denied the estate's motion for reconsideration. This appeal followed.

The findings of fact in a case tried by a probate court without a jury are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made, even if there was evidence to support the finding. *Id*. This Court defers to the probate court on matters of credibility and gives broad deference to its findings "because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A probate court's award of fees is reviewed for an abuse of discretion. *In re Humphrey Estate***,** 141 Mich App 412, 439; 367 NW2d 873 (1985).

The estate first argues that the trial court erred in finding that a contract existed between the estate and Waddell for Waddell's representation of the estate. This Court reviews questions involving contract construction de novo. *Henderson v State Farm Fire & Cas Co,* 460 Mich 348, 353; 596 NW2d 190 (1999). In particular, the estate argues that no contract existed because VanderKlok signed the contingent fee agreement on September 5, 2003, and was not appointed as the estate's personal representative until September 9, 2003. In support, the estate points to MCL 700.3715(w), which provides that a personal representative may "[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties." The estate also cites our Supreme Court's holding in *Wagner v La Croix' Estate*, 289 Mich 126, 128-129; 286 NW 182 (1939), that an executor of an estate could not contractually bind the estate until he was qualified to do so, and also could not ratify the contract made before such qualification.

The estate's reliance upon *Wagner* is misplaced because the Estate and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., which took effect in April 2000, provides that a personal's representative's powers can relate back in time to include some acts occurring before their appointment. MCL 700.3701.[1] It thus supercedes the rule articulated in *Wagner*.

The record shows that after VanderKlok signed the contingent fee agreement, Waddell filed the necessary paperwork to have VanderKlok appointed as personal representative. It also shows that Waddell proceeded to negotiate with decedent's and Fongers' insurers to procure benefits for the estate, and that the Felix family instructed Waddell to perform a thorough investigation regarding all potential causes of action for the estate. Waddell's actions subsequent to VanderKlok's signing of the contingent fee agreement on September 5, 2003, were beneficial to the estate because they related to the appointment of a personal representative and the pursuit of benefits for the estate. We conclude that VanderKlok's powers as a personal representative

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[1] MCL 700.3701 states,

> A personal representative's duties and powers commence upon appointment. A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment.

related back in time to the September 5, 2003 hiring of Waddell and the trial court's finding that a contractual relationship existed between the estate and Waddell is not clearly erroneous.

The estate next argues that the trial court erred in finding that VanderKlok authorized Waddell to settle the claim with State Farm. It contends that VanderKlok never authorized Waddell to settle a claim, and that he could not do so without the client's consent. The estate also contends this action constituted professional misconduct pursuant to MRPC 1.2(a).[2] VanderKlok claims she informed Waddell that she wished to discuss any settlement of a wrongful death claim with her family before making a decision, and that she did not specifically instruct Waddell to explore settlement of the claim with State Farm. She also claims she instructed Waddell to investigate the wrongful death claim, that she did not give written authorization to Waddell to settle a wrongful death claim, that during an October 13, 2003 meeting she and Waddell did not discuss settlement with State Farm on the wrongful death claim, and that she did not recall giving Waddell verbal approval to settle a wrongful death claim during a phone conversation.

Waddell argues that VanderKlok did accept the State Farm offer of settlement during their phone conversation on October 17, 2003. Waddell stated that during the October 13, 2003 meeting with VanderKlok and Greg, they discussed several aspects of the case. Waddell also stated that he informed them that his investigation and research indicated that any other civil causes of action would be unlikely, and that VanderKlok informed him of the family's wish to expedite the pursuit of the wrongful death claim and settlement because of Mary's upcoming heart surgery. Waddell also stated that he obtained a settlement offer for $100,000, the insurance policy limits, from State Farm, phoned VanderKlok to discuss the offer, and that VanderKlok told him to go ahead and accept the offer during that conversation. Subsequently, Waddell phoned State Farm representative Kamp and accepted the offer. Waddell also submitted the affidavit of his legal assistant, Sandra Miles, as factual support for his contentions.

A wrongful death action must be brought by the personal representative of an estate. MCL 600.2922(2). The trial court's finding that VanderKlok accepted the settlement offer was a factual finding, and the trial court noted that it considered the affidavits submitted. Despite the family's displeasure with Waddell's representation, the record shows that VanderKlok and Greg requested that Waddell continue his investigation into all possible potential wrongful death actions. The record shows that Waddell did so and obtained a settlement offer in the performance of his duties. Thus, we conclude that the trial court's finding that VanderKlok accepted the settlement offer is not clearly erroneous. Further Waddell did not violate MRPC 1.2 because there was no evidence that Waddell accepted the offer in the face of any contrary instruction from VanderKlok.

The estate also argues that the evidence does not support the trial court's finding that Waddell thoroughly investigated the collectibility of Bartholomew and Yvonne Fongers. The

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[2] MRPC 1.2(a) provides, in pertinent part, that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter."

estate specifically argues that Waddell misrepresented that his investigation into the Fongers' potential liability revealed that both Bartholomew and Yvonne Fongers were uncollectible and had no assets because the "Affidavit of Yvonne M. Fongers" is not an affidavit because it was not attested before a notary public. Further, the estate notes that Yvonne signed the affidavit on October 28, 2003, one day after the estate discharged Waddell as its attorney.

The estate's argument is based in part upon its contention that Waddell did not provide a statement or affidavit to the estate during the course of Waddell's representation that attested to the fact that the Fongers were uncollectible and had no assets. The estate relies on the fact that the first statement by Yvonne is dated on October 28, 2003, and that the affidavit of Bartholomew and Yvonne Fongers is dated on December 5, 2003, and argues that these dates indicate that Waddell did not investigate their collectability during his representation of the estate. However, the estate cites no authority that requires such an affidavit or statement to be secured as proof of an investigation. In addition, although the estate argues that Waddell falsely represented that the Fongers' were uncollectible other than through their State Farm insurance policy, it offers no evidence to the contrary.

Affidavits clearly indicate that VanderKlok, and later, VanderKlok and Greg, instructed Waddell to conduct a thorough investigation into the assets and collectability of the Fongers and other potential defendants. Evidence exists that communications between Waddell and the Felix family led Waddell to logically conclude he had the "go ahead" to pursue a settlement with State Farm, the Fongers' insurer. In finding that Waddell conducted his investigation appropriately, the trial court stated, "[b]ased on the specifics contained within the parties' pleadings, including affidavits, it appears to this Court that Attorney Waddell did, in fact, appropriately investigate other potential claims, defendants, and issues of collectability in this case, and conveyed those findings both to the personal representative and to other family members." Based upon the record, the trial court's finding does not constitute clear error.

The estate also argues that the trial court abused its discretion in approving Waddell's request for $34,132.31, the full one-third contingency fee plus costs, and by failing to find that Waddell was entitled to only quantum meruit for his services. In support of its argument, the estate cites the following: "an attorney on a contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon quantum meruit, and not the contingent fee contract." *Ambrose v Detroit Edison Co*, 65 Mich App 484, 491; 237 NW2d 520 (1975).

However, the rule that quantum meruit, rather than contract terms, is the proper measure of compensation only applies where the attorney's services are terminated before completing the contracted services. When an attorney is discharged before completing 100% of the contracted services under a contingent fee agreement, the attorney is entitled to "compensation for the reasonable value of his services on the basis of quantum meruit, provided that his discharge was wrongful or his withdrawal was with cause." *Morris v City of Detroit*, 189 Mich App 271, 278; 472 NW2d 43 (1991). Thus, under a contingent fee agreement, a prematurely discharged attorney is entitled to compensation based upon quantum meruit, which can be calculated as a percentage of the contingency fee that reflects the percentage of the work completed by the attorney. *Id*.

In the present case, the trial court stated,

> It appears clear to this Court, upon examination of all written pleadings, that if State Farm agreed to settle for the policy limits, then Mr. Waddell performed one hundred percent of the duties for which he contracted, in a timely and thorough fashion.
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> Accordingly, this Court finds that, if State Farm confirms that they agreed to settle for policy limits, and conveyed that agreement to Mr. Waddell, Mr. Waddell is entitled to the full contingency fee, plus expenses incurred.

The fee agreement in the present case states the following scope of representation: "I/we agree to employ the Law Offices of William J. Waddell as my attorney for the purpose of representing me in any claim or action for damages arising out of the following facts: Potential wrongful death action re: Kenneth Joe Felix." It also provides that Waddell's fee would be one-third of the net recovery, in accordance with MCR 8.121, and that Waddell will have a lien in that amount on any settlement, verdict, or recovery.

The trial court's finding that Waddell performed the services that he was hired to perform, and was discharged shortly after that performance is not clearly erroneous. In addition to obtaining an agreement from State Farm for the payment of full limits, Waddell obtained a $5,000 settlement for funeral costs from decedent's insurer, AIG, which exceeded the $1,750 policy limit by $3,250. Further, the evidence established that Waddell investigated and researched the highway exception to governmental immunity and concluded that the estate had no cause of action, and also investigated the Fongers and concluded that they were not collectible. Based upon these facts, the trial court's finding that Waddell performed 100% of his contracted duties is not clearly erroneous, and the trial court did not abuse its discretion in awarding Waddell 100% of the contingency fee.

The estate also argues that Waddell cannot recover his fees because he committed professional misconduct. The estate cites *Reynolds v Polen*, 222 Mich App 20, 26; 564 NW2d 467 (1997) for the proposition that an attorney who has committed professional misconduct is barred from any recovery. The estate alleges that Waddell violated MRPC 1.2 and 1.4, based upon its allegation that VanderKlok never approved the State Farm settlement, and that although Waddell submitted a billing statement, he did not comply with the estate's request for an accounting of his time spent working on the present case.

MCR 5.313(C) states, "[r]egardless of the fee agreement, every attorney who represents a personal representative must maintain time records for services that must reflect the following information: the identity of the person performing the services, the date the services are performed, the amount of time expended in performing the services, and a brief description of the services." However, MCR 5.313(G) provides that subsection (C) does not apply to a contingent fee agreement between a personal representative and an attorney under MCR 8.121. Because there was a contingent fee agreement in the present case, Waddell was not required to maintain such time records as part of the representation and the estate's argument fails.

The estate also argues that the trial court exceeded its statutory authority in ordering settlement without complying with MCL 700.3924(1)-(2) because the estate never petitioned the probate court for leave to settle a claim or to distribute proceeds, the trial court did not conduct a hearing, and no notice was provided to those persons who may be entitled to damages under MCL 600.2922, the statute governing wrongful death actions. Specifically, the estate argues that the trial court could not approve the settlement with State Farm because VanderKlok never filed a petition for leave to settle the claim. The estate contends that MCL 700.3924 does not permit a trial court to approve a settlement without the filing of a petition to do so. The estate also argues that the trial court erred when it ordered and approved distribution of the settlement proceeds to Waddell. However, MCL 700.3924 states, in pertinent part, "[f]or the purpose of settling a claim as to which an action is not pending in another court for damages for wrongful death . . . **if** a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons . . . the court **may** conduct a hearing and approve or reject the settlement." [Emphasis added.]

The estate's arguments are all based on the premise that a personal representative is required to petition the court to settle a wrongful death claim on an estate's behalf. If the statute's language is clear and unambiguous, it is presumed that the Legislature intended its plain meaning and the statute is enforced as written. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). The use of the word "if" in MCL 700.3924 indicates that a personal representative is *not* required to petition the court for leave to settle a claim. Further, the use of the word "may" indicates that the court need not conduct a hearing on the matter if a such a petition is filed. Instead, it may conduct a hearing at its discretion. Given the competence, clarity, and completeness of Waddell's work, there is no abuse of discretion and there has been no error.

Finally, the estate also argues that the trial court erred and abused its discretion when it granted Waddell's motion for attorney fees and costs because no settlement was placed on the record in compliance with MCR 2.507(H). MCR 2.507(H) provides, "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." MCR 2.507 is entitled "Conduct of Trials," and each of its subrules are addressed to trial aspects. No lawsuit or trial existed in the present case. However, evidence of the agreement in writing does exist in the present case. Waddell's affidavit attests to the fact that VanderKlok verbally accepted the settlement offer from State Farm. In addition, the letter from Waddell to State Farm representative Kamp confirms the settlement. Therefore, MCR 2.507(H) is inapplicable to the present case, and even if it did apply, the provision was satisfied. For all of these reasons, the trial court's findings and grant of Waddell's motion for attorney fees and costs did not constitute clear legal error or an abuse of discretion.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat. M. Donofrio